PANG FEE YOON

v.

PIONG KIEN SIONG & ORS

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-99-1998]
5 JULY 1999

TORT: *Defamation - Libel - Libellous statutory declaration againts accountant - Malice - Qualified privilege - Fair comment - Assessment of damages*

The defendants were members of a partnership known as Chuan Soon Enterprise. The plaintiff was employed by the partnership to audit and draw up its accounts. On 30 November 1993, the defendants withdrew from the partnership. About five years later, the defendants affirmed statutory declarations stating that they had been fraudulently induced to withdraw from the partnership by a report prepared by the plaintiff and that the plaintiff had acted contrary to the ethics of an accountant. The defendants also filed a complaint against the plaintiff and forwarded the statutory declarations to the Malaysian Institute of Accountants ('MIA'). The MIA commenced an investigation into the complaint but exculpated the plaintiff. The plaintiff then sued the defendants for defamation.

Held:

[1] The lack of truth in the statutory declarations reflected the defendants' malice towards the plaintiff.

[2] As there was no successful cross-examination by the defendants regarding the assertion of the plaintiff that his name had been smeared and that he had suffered financially and socially, the Court must accept the truth of the plaintiff's evidence.

[3] The defence of qualified privilege was not successfully raised by the defendants as there was an absence of common interest or mutual concern between the defendants and the MIA.

[4] An assertion of 'public spiritedness' is insufficient to qualify for the defence of qualified privilege.

[5] The words in the statutory declarations were plain and not intrinsically ambiguous; they were easily interpreted as libellous by the ordinary man and had the tendency to excite against the plaintiff.

[6] The commission of perjury by the defendants, *vis-a-vis* the statutory declarations, merely added malice to the statutory declarations and the complaint. That being so, even a defence of fair comment which is a right shared by every member of the public, would be denied.

[7] As there was no application for damages to be assessed separately and no evidence was adduced by any of the co-defendants that he was less instigative, culpable and hence deserving of a lesser punishment, the court was inclined not to split up the damages.

[Plaintiff's claim allowed.]

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1965] 31 MLJ 142 ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd 64 TLR 177 ***(refd)***
Clarence Wilfred v. Tengku Adnan Tg Mahmud & Anor [1983] 1 CLJ 136 ***(refd)***
Coopers & Lybrand v. Singapore Society Of Accountants & Ors [1988] 3 MLJ 134 ***(refd)***
Datuk Harris Mohamed Salleh v. Abdul Jalil Ahmad & Anor [1983] 2 CLJ 211 ***(refd)***
Gordon Berkeley Jones v. Clement John Skelton [1963] 1 WLR 1362 ***(refd)***
Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1978] 1 MLJ 75 ***(refd)***
Henry Wong v. John Lee & Anor [1980] 2 MLJ 254 ***(refd)***
Hobbs v. Tinling (CT) & Co Ltd, Hobbs v. Nottingham Journal Ltd [1929] 2 KB 1/17 ***(refd)***
Lau Chee Kuan (F) v. Chow Soong Seong & Ors [1955] MLJ 21 ***(refd)***
Lee Kuan Yew v. Seow Khee Leng [1989] 1 MLJ 172 ***(refd)***
Jeyaretnam (JB) v. Lee Kuan Yew [1992] 2 SLR 310 ***(refd)***
John v. Dharmaratnam [1962] 28 MLJ 187 ***(refd)***
John Lee & Anor v. Henry Wong Jan Fook [1981] 1 MLJ 108 ***(refd)***
Mccarey v. Associated Newspapers Ltd [1965] 2 QB 86/104 ***(refd)***
Rajagopal v. Rajan [1972] 1 MLJ 45 ***(refd)***
Rookes v. Barnard [1964] AC 1129/1221 ***(refd)***
S Pakianathan v. Jenni Ibrahim [1988] 2 MLJ 173 ***(refd)***
Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General [1975] 1 MLJ 47 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3
Defamation Act 1957, s. 18

Other source(s) referred to:

The Law Of Defamation In Singapore And Malaysia, Keith R Evans 2nd edn, p 10
Halsbury's Laws Of England, vol 28, 4th edn, p 10

For the plaintiff - CS Ng; M/s CS Ng & Assoc
For the defendants - Peter Foo; M/s Foo Nyong & Assoc

Reported by Izzaty Izzudin

JUDGMENT

Suriyadi Halim Omar J:

The three defendants in this case were once members of a partnership called Chuan Soon Enterprise. The plaintiff, an accountant by occupation, was then employed by that partnership to audit and draw up its accounts. On 30 November 1993 the three defendants withdrew from that partnership. Matters reached to a broil as the defendants refused to consider the matter closed, inspite of their earlier withdrawal from that partnership. For reasons known only to themselves, after a delay of about four years and ten months, they separately affirmed a statutory declaration dated 9 January 1998, stating that they had been fraudulently induced to withdraw from the partnership by a report prepared by the plaintiff. They further alleged in those declarations that the plaintiff had prepared the report (valuation of business report):

(1) based on unaudited accounts;

(2) based on discussions with the plaintiff's brother without the presence of other partners;

(3) Without investigating further into the abnormal losses prior to their withdrawals from the partnership;

(4) at the request of the plaintiff's brother, knowing in advance that the report would be used as a basis for discussions by other partners with a view to dissolving the partnership; and

(5) had submitted two separate sets of income tax returns for the year of assessment 1994.

Apart from the above, they also affirmed that the plaintiff had acted contrary to the ethics of accountants. If they had left the statutory declarations as they were, matters would not have got out of hand. Unfortunately, a step in the libellous direction occurred when their vendetta against the plaintiff reached a high pitch, with the filing of a complaint against him with the Malaysian Institute of Accountants. Together with it, they attached the three separate statutory declarations. For purposes of this case, as the statements made by the defendants were written, this is thus an action in libel, a matter within the law of defamation. On receipt of this complaint together with the statutory declarations, the Malaysian Institute of Accountants, notified the plaintiff on 22 January 1998, as per exh. P1, of it. Pursuant to it, the Malaysian Institute of Accountants commenced their investigation headed by its own investigation committee. At the completion of that investigation, on 15 May 1998 the plaintiff was informed by the investigation committee that it would not pursue the matter any further. In brief the plaintiff had been exonerated.

In the current case, his reputation, as alleged by the plaintiff had been tarnished inspite of the positive outcome of the investigations. The spilling over effect of that complaint had caused him embarrassment, odium and loss of business. In the course of the hearing, he testified that regardless of the exoneration, in the event any enquiries were made to the Malaysian Institute of Accountants pertaining to his background, the enquirer would inevitably be informed of that complaint. In other words that unpleasant incident would always cast a dark shadow over his life, a predicament which would be financially unbearable for an accountant.

For reasons known only to him, the plaintiff merely zeroed in on one specific financial loss, *ie*, the termination of his services with a company called Natural Holdings Sdn Bhd. That company as per B26, had appointed the plaintiff for consultancy work within the group of Natural Holdings Sdn Bhd, for a period of five years. It transpired that the complaint of the three defendants had reached the ears of the group. It would appear too that, as per B30, so long as there were complaints against the plaintiff involving any act or purported acts of fraud, his services would still be terminated by this company, regardless of the outcome of the investigation. Clearly the defendants' documents had a profound effect on the thinking of Natural Holdings Sdn Bhd.

The Law And The Necessary Ingredients

By virtue of s. 3 of the Civil Law Act 1956, the english common law which is the spring board of the local defamation law, has been statutorily imported. Keeping abreast with time, the Defamation Act 1957 (Act 286) was promulgated, together with the necessary modifications. This Act, in its own way balances the right of freedom of speech and expression enshrined in the federal constitution, with the right of protection of an individual's reputation. In so far as the law is concerned, and in relation to the current case, it is trite that to succeed in a case of defamation, the plaintiff must, *inter alia*, prove that the statements (statutory declarations and complaint in this case) had been made to a third person by the defendants affecting his person (*Clarence Wilfred v. Tengku Adnan bin Tg Mahmud & Anor* [1983] 1 CLJ 136). Thereafter, it is encumbent upon the court to peruse that statement, and determine whether the words are capable of falling within the legal definition of defamation. The court cannot escape this duty. Once that has been successfully established, the onus shifts to the defendant to establish the necessary defences.

What is defamatory within the context of the law, will depend upon the finding of the judge pursuant to the attempts of the plaintiff to establish his complaints. Whether the words resorted to are capable of bearing a defamatory meaning is a question of law. Whether the words do indeed have the meanings alleged is a question of fact. There is no established test to determine what facts fall

within the context of that tort, although general observations formulated by case laws may be used as a guide. From case laws it is observed that courts when applying the various tests, will look to a particular group, in whose eyes their estimation of the plaintiff has been reduced. The court will certainly have to look at the words objectively, rejecting the intention of the maker and only concerned with the effect. The judge, depending on the situation, will sieve the words from the view point of the average reasonable person, or that of the right thinking members of society in general (*Lau Chee Kuan (F) v. Chow Soong Seong & Ors* [1955] MLJ 21; *Jeyaretnam (JB) v. Lee Kuan Yew* [1992] 2 SLR 310; *Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General* [1975] 1 MLJ 47). Unless the words have any intrinsic ambiguity within them, the court may construe them in their natural and ordinary meaning (*Lee Kuan Yew v. Seow Khee Leng* [1989] 1 MLJ 172).

How to arrive at their natural and ordinary meaning again is no easy matter, but necessitates the presiding judge to scrutinise the words. There should not be any unnecessary intellectual exercise to arrive at the meanings of those words. In other words, the whole process should be effortless. For this purpose courts must reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation. In *Gordon Berkeley Jones v. Clement John Skelton* [1963] 1 WLR 1362, under held is written:

> that the ordinary and natural meaning may include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict rules of construction would draw from the words.

Before deciding whether the words indeed are defamatory, I find it necessary to act on a certain course of action. I find it necessary to consider certain legal ingredients, together with the salient facts already adduced. For this purpose the next sub-heading is pertinent.

Legal Ingredients, Salient Factors And Facts Considered In The Course Of Deciding Whether The Words Were Defamatory

To succeed in a defamatory action, a third party must have knowledge of the defamatory statements or words. In this case, those statements or words which came in the form of statutory declarations, were made known to the Malaysian Institute of Accountants. After a thorough investigation the plaintiff was exonerated.

Highly relevant too is that the words must relate to the plaintiff. In the current case there was nothing oblique about it in that the statutory declarations were related to him (*Clarence Wilfred v. Tengku Adnan bin Tg. Mahmud & Anor (supra)*; *Coopers & Lybrand v. Singapore Society Of Accountants & Ors* [1988] 3 MLJ 134).

There were no cross-examinations pertaining to the agreed documents which were marked B. The contents must therefore be accepted, inclusive of the statutory declarations. On that score, it must be accepted that on the day the defendants withdrew from the partnership, the Valuation of Business Report was yet to be in existence.

The few questions posed during the cross-examination, *inter alia,* were basically related to:

(a) records supposedly having been detained despite having been requested for by the defendants. The plaintiff on the other hand testified that there never was a request for those documents. B1-B6 did not indicate that request;

(b) the effect of personal relationship on the objectivity of a professional. The plaintiff answered that there was no prevailing law disallowing an accountant to work for one's brother; and

(c) the right of Natural Holdings Sdn Bhd to terminate the services of the plaintiff under whatever circumstance. The plaintiff denied this and testified that they could only terminate his services if there existed matters which were detrimental to that company. He further testified that his services were short-lived due to that complaint.

Perusing the three basic issues, which were satisfactorily answered by the plaintiff, it is my finding that for all intents and purposes there was no worthwhile cross-examination undertaken.

As there were no successful cross-examinations, no adducement of documents or calling of witnesses by the defendant to rebut the assertion of the plaintiff with regard to the Valuation of Business Report, I therefore must accept the fact that that document was only ready by 9 December 1993 (B12). Perusing the evidence, it is clear that the defendants by 30 November 1993 had written in to declare of their intention to withdraw from Chuan Soon Enterprise (confirmed by B7, B10 and B11). If the withdrawal had taken place earlier than the completion of the document of Valuation of Business Report, then it is baseless to allege that that report influenced the defendants' decision. The lack of truth of the statutory declarations, with particular reference to the Valuation of Business Report, merely reflect their malice against the plaintiff. To quote the remarks of Wan Hamzah SCJ at p. 179 of *S Pakianathan v. Jenni Ibrahim* [1988] 2 MLJ 173:

> The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice.

The burden of proving malice is on the plaintiff. This he has successfully done so. The failure to cross-examine or adduce witnesses to reject the plaintiff's contention, that the Valuation of Business Report was yet to be produced on 30 November 1993, which therefore did not rebut the malice factor, surely did not help the defendants' case. This failure also confirmed my finding that the defendants had no honest belief regarding that document when complaining to the Malaysian Institute of Accountants (*Chop Kim Lee Seng Kee v. Yeo Kiat Jin* [1956] 22 MLJ 67)

As there were no successful cross-examinations by the defendants regarding the assertion of the plaintiff that his name had been smeared, and had suffered financially and socially, I therefore must accept the truth of his evidence.

The law presumes that defamatory words are false, with the burden of establishing the truth of any statement falling squarely on the defendants (*Abdul Rahman Talib v. Seenivasagam & Anor* [1965] 31 MLJ 142). Procedurally, the defendants should have attempted to prove the truth of those statements, after the plaintiff had adduced the defamatory statements. How to carry out this difficult task will depend on the type of action undertaken by the defendants. It may be resolved at the plaintiff's stage by a tactically successful cross-examination or by the production of cogent evidence at the defence stage. As it were, as those courses of action were not attempted by the defendants, the truth of those words were never proved. The evidential burden on this specific issue, not on the case proper, therefore never was reshifted to the plaintiff. As the latter had proven his case at the earliest of stages, what with the defendants literally throwing in the towel, the plaintiff was home and dry.

It is my finding that the defence of qualified priviledge, which is a question of law and required to be proved by the defendant, was not successfully implemented (*John Lee & Anor v. Henry Wong Jan Fook* [1981] 1 MLJ 108; *Rajagopal v. Rajan* [1972] 1 MLJ 45). There was absence of common interest or mutual concern between the defendants and the Malaysian Institute of Accountants. As the defendants had withdrawn from that partnership in 1993, thus cutting off their nexus with it, they inevitably terminated all connections with the plaintiff, let alone the institution. In short, after the withdrawal, the defendants' interest and connection with the plaintiff ended. That being so, the bridge to the Malaysian Institute of Accountants simultaneously collapsed. The five year period between the date of the withdrawal and the affirmation of the statutory declarations, followed by the sending of these documents to the Malaysian Institute of Accountants merely magnified their spite or ill-will. Any assertion of public spiritedness is insufficient to qualify for the defence of qualified priviledge. In this context even that factor failed.

Were The Words Defamatory?

According to the defendants, the plaintiff was supposed to have committed fraud, and had acted in an unprofessional and unethical behaviour when preparing the relevant auditing report. Yet factually, on the date the plaintiff was supposed to have misconducted himself the report was yet to exist. On this score they had started off on a wrong footing.

Inspite of this false accusation, their words did not make it any less defamatory. Keith R Evans in *The Law Of Defamation In Singapore And Malaysia* 2nd edn, at p. 10 in succinct terms, regarding the test whether a statement is defamatory, summed up the various case laws, in this manner:

> The test of the defamatory nature of a statement is therefore its *tendency* to excite against the plaintiff the adverse opinion of those within the control group selected by the court. If the words have such a tendency, they will be held to be defamatory, even though no one may actually believe the statement to be true.

Therefore, even if untruth alone will not make a statement defamatory, and no one believes those words, so long as they have a tendency to excite the relevant group of people against the plaintiff, those words may be held to be defamatory (*Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General (supra)*).

Having perused the statutory declarations, irrespective of the effect of the incorrect accusation, I am satisfied that the natural and ordinary meaning of those words meant exactly as how they were written. Those words were plain and not intrinsically ambiguous, and easily interpreted as libellous by the ordinary man. To the ordinary and law abiding citizen he had acted fraudulently, contravened the by-laws of his profession (for the initiated, the by-laws (On Professional Conduct And Ethics)), and had behaved in a manner unbecoming of an accountant. Regarding the test as related by Keith R Evans, the tendency to excite against the plaintiff became a fact when it reared its ugly head in the form of the withdrawal of the five year contract by Natural Holdings Sdn Bhd. That tendency also crystallised itself further when society and his peers within the profession ostracized him.

The commission of the perjury *vis-a-vis* the valuation of business report, by the defendants merely add malice to the statutory declarations and complaint. That being so, even a defence of fair comment which is a right shared by every member of the public, will be denied (*Rajagopal v. Rajan (supra)*).

Damages

The plaintiff at para. 12 of the statement of claim has prayed for two types of damages *viz.* general damages and specific damages. In law, as libel is actionable *per se*, special damages need not be shown or even successfully be proved in order to succeed. If proved, and to ensure that a sum may be recovered, the aggrieved party must be able to convert and estimate that loss in pecuniary form (*Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177; *John v. Dharmaratnam* [1962] 28 MLJ 187). A financial loss suffered due to the termination of a contract, would certainly fall squarely under this category, as it flows from those libellous words. In the current case the plaintiff not only has pleaded special damages but also succeeded in proving them. As the defendants made no attempts to cross-examine nor adduce evidence to cast any doubts on those losses, I therefore accept the plaintiff's monthly loss of RM10,000 with Natural Holdings Sdn Bhd. As there was a balance of four years and nine months, his eventual loss would be RM570,000 (57 months x RM10,000). According to B36, apart from the monthly RM10,000 the plaintiff would receive an additional sum of RM50,000 for the period of five years. On a pro rata basis, I calculate that he would receive an additional RM833.33 every month. As he had lost 57 months due to the termination of his services, he therefore lost an additional RM47,499.81 (RM833.33 x 57 months). To summarise this claim, I therefore give judgment in the sum of RM617,499.81 (RM570,000 + RM47,499.81) for specific damages.

A failure in proving actual damage to a plaintiff's reputation is no barometer to the outcome of a case. On the other hand, in the event of success, it will not stop the legal presumption that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation. Eventhough he is not required to prove his reputation or expected to prove that loss or damage, he is nonetheless at least entitled to some nominal damages (*Hobbs v. Tinling (CT) & Co Ltd, Hobbs v. Nottingham Journal Ltd* [1929] 2KB 1/17; *Halsbury's Laws Of England* vol. 28 4th edn p. 10. This award, universally referred to as general damages is meant to compensate the plaintiff and not, except in special circumstances, to punish the defendant (*Rookes v. Barnard* [1964] AC 1129/ 1221). To assess this award the court will consider the pecuniary losses, other than those claimed as special damages, and social disadvantages which result or may be thought likely to result from the wrong which has been done (*Mccarey v. Associated Newspapers Ltd* [1965] 2QB 86/104).

By virtue of the facts before me I am not unmindful of some pertinent factors in relation to both parties, namely that:

1. the plaintiff, whose profession is highly sensitive to complaints, not only had suffered financially but also socially and mentally;

2. this unpleasant incident would never leave him alone. This is so, as the Malaysian Institute of Accountants has a policy of supplying any enquirer of any investigation regardless of the outcome of that investigation or the repercussion to the party investigated;

3. the defendants had malice in mind when they submitted the complaint together with the statutory declarations;

4. they withdrew from the partnership on 30 November 1993 whilst the report was only ready on 9 December 1993. That meant, by virtue of the chronology of events, when they affirmed the statutory declarations on 9 January 1998, they knew that their withdrawal was not due to the contents of the report. Inspite of that they still deliberately perjured themselves; and

5. the defendants never made any attempts to apologise or retract the words affirmed by them. They permitted the matter to drag on all the way to the court, to the detriment of the plaintiff.

The general rule is that damages are to be assessed on a compensatory basis *ie*, to compensate the plaintiff for the harm caused to him by those libellous words. That compensation may be inflated by certain aggravating factors, in the like of the defendants' motives, conduct, malice etc. I had to bear in mind that the plaintiff is an accountant, whose very financial success would depend on the public's estimation of his integrity and character. Any reduction in that estimation will directly affect his future, socially or financially. I had to bear in mind too, that, in a small state with a small population, unlike, say Kuala Lumpur, any libellous words however untrue, would travel thick and fast. The repercussion for the plaintiff would be very oppressive (*Henry Wong v. John Lee & Anor* [1980] 2 MLJ 254). Having considered all the relevant factors, including the aggravating factors, I therefore order general damages of RM300,000. A rather relevant point that has beset me is whether I should split up the damages or simply order a lump sum judgment. Having perused the Defamation Act 1957 (Act 286), I find s. 18 highly pertinent to this poser. This section reads:

> Whenever in an action of libel the plaintiff sues more than one defendant, whether jointly, severally, or in the alternative, and evidence is given of malice in one defendant or of any other matter of aggravation which would not be admissible in evidence against any other defendant if he were sued alone, such other defendant may apply to the court to have the damages against himself and his co-defendants separately assessed, and if such application be made the court shall assess the damages separately against each defendant and no defendant shall be liable nor shall execution issue against him for any further or other damages than shall be so assessed against him.

In the current case, I am inclined not to split up the damages equally among the three defendants, general or specific, as:

1. there has been no application by any of the co-defendants to be assessed seperately;

2. there was absolutely no evidence adduced by any of the co-defendants that he was less instigative, culpable and hence deserving a lesser "punishment"

3. the complaint was submitted jointly by the defendants. Not only were the facts of the complaint similar but the sworn statements were also done on the same day. In fact there was complete collusion among them; and

4. the defendants were equally malicious in their acts (*Datuk Harris bin Mohamed Salleh v. Abdul Jalil bin Ahmad & Anor* [1983] 2 CLJ 211 [1984] 1 MLJ 97). This means that all the three defendants are jointly liable for the total damages (*Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor* [1978] 1 MLJ 75).

To avoid any uncertainty, my order is that there will be judgment for the plaintiff against the defendants. I also hereby order:

1. for prayer 12(a), a lump sum of RM617,499.81 for specific damages;

2. for prayer 12(b), a lump sum of RM300,000;

3. interests against specific damages as per prayer 12(c); and

4. costs as per prayer 12(d).